82-907

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

STATE OF NORTH CAROLINA
~~Petitioner,~~ Respondent

v.

TRAVIS HICKS PROCTOR
~~Respondent.~~ Petitioner

On Writ of Certiorari to the
North Carolina Court of Appeals

PETITION FOR CERTIORARI - CRIMINAL CASE

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QUESTION PRESENTED

May a state convict a defendant pursuant to a criminal statute that does not prohibit the conduct charged?

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

STATE OF NORTH CAROLINA
Petitioner,
v.

TRAVIS HICKS PROCTOR,
Respondent.

On Writ of Certiorari to the
North Carolina Court of Appeals

PETITION FOR CERTIORARI - CRIMINAL CASE

The Petitioner, Travis Hicks Proctor, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the North Carolina Court of Appeals entered in this proceeding on August 17, 1982, and the Order of the Supreme Court of North Carolina, denying review, entered on September 22, 1982.

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JURISDICTION

The decision of the North Carolina Court of Appeals was entered on August 17, 1982. Petitioner's Petition for Discretionary Review was denied by the Supreme Court of North Carolina in an Order filed on September 22, 1982, and this Petition for a Writ of Certiorari was filed within sixty (60) days of that date. The sixtieth day was Sunday, November 21, 1982, and this Petition was filed on Monday,

November 22, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV; §1. All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION INVOLVED

North Carolina General Statute §90-95(h)(3): Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of coca leaves or any salts, compound, derivative, or preparation thereof which is chemically equivalent or identical to any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine) or any mixture containing any such substance, shall be guilty of a felony which felony shall be known as "trafficking in cocaine" and if the quantity of such substances or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall, upon conviction, be punished by imprisonment for not less than three years nor more than 10 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall, upon conviction, be punished by imprisonment for not less than six years nor more than 15 years in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall, upon conviction, be punished by imprisonment for not less than 16 years nor more than 40 years in the State's prison and shall be fined not less than two hundred fifty thousand dollars ($250,000).

STATEMENT OF THE CASE

By an indictment returned on September 29, 1980, Petitioner was charged by a Wilson County, North Carolina, Grand Jury with the felony of trafficking in cocaine in violation of North Carolina General Statute §90-95(h)(3).

Prior to trial, Petitioner moved for a Bill of Particulars, requesting that the State identify the specific substance in which the Petitioner was alleged to have trafficked. (Record pages 4-8). The State responded that the substance in question was "a derivative of coca leaves." (R.pp. 8,9).

Thereafter, prior to trial, Petitioner filed a written motion to dismiss the charge on the ground that the statute, as applied to Petitioner, was unconstitutional in that it did not prohibit trafficking in "a derivative of coca leaves." (R.p. 9).

Following a hearing on this motion, the Court found that the statute did include a prohibition against trafficking in "a derivative of coca leaves." It concluded, therefore, that the statute was not unconstitutional." (R.pp. 10, 11).

The case came on for trial at the June 15, 1981, Criminal Session of Wilson County, North Carolina, Superior Court. Prior to Jury Selection, the Petitioner renewed his motion to dismiss and it was again denied. (R.p. 12). During the trial, the State's chemist testified that the substance in question was "a derivative of coca leaves." (Transcript page 198, Appellant's Brief Appendix E). Following this testimony, the Petitioner again moved to dismiss. The motion was denied. (R.pp. 13, 14).

Following the arguments of counsel and instructions by the Court, the Jury returned a verdict finding the Petitioner guilty as

charged. The Court then entered judgment sentencing the Petitioner to a prison term of eighteen to twenty-five years and the payment of a fine in the amount of $250,000.00.

The Petitioner gave Notice of Appeal to the North Carolina Court of Appeals. In the Record on Appeal to that Court, the Petitioner's Assignments of Error included the following:

> ASSIGNMENT OF ERROR NO. 1
>
> That the Court erred in denying defendant-appellant's motions, made before and during trial, to dismiss the charge of trafficking in cocaine on the grounds that G.S. 90-95 (h)(3) is unconstitutional on its face or as applied to the defendant-appellant for vagueness.
>
> EXCEPTIONS NOS. 2 (R.p. 11); 3 (R.p. 12); 7 (R.p. 14); 8 (R.p. 15); 9 (R.p. 16); 15, 16 (R.p. 17); 17 (R.p. 18).
>
> ASSIGNMENT OF ERROR NO. 2
>
> That the Court erred in denying defendant-appellant's motions,

made before and during trial, to dismiss the charge of trafficking in cocaine on the grounds that G.S. 90-95(h)(3) is unconstitutional on its face or as applied to the defendant-appellant in that "a derivative of coca leaves", as stated by the State in its Answer: Bill of Particulars, is not included within the confines of said statute.

EXCEPTIONS NOS. 2 (R.p. 11); 3 (R.p. 12); 7 (R.p. 14); 8 (R.p. 15); 9 (R.p. 16); 15, 16 (R.p. 17); 17 (R.p. 18).

(R.pp. 39, 40).

The North Carolina Court of Appeals, in an opinion filed on August 17, 1982, met the issue raised by the Assignments of Error head-on. The Court agreed that the trafficking provision of the North Carolina Controlled Substances Act does not include a derivative of coca leaves among the substances covered by the trafficking provisions. The Court concluded, however, that the omission of this substance was a legislative oversight. Thus, it held that the full definition of cocaine from the non-trafficking provisions of the Act should

be read into the trafficking provisions of the Act. Accordingly, the Petitioner's conviction was affirmed.

Within the time prescribed by the North Carolina Rules of Appellate Procedure, the Petitioner filed, on September 3, 1982, a Petition for Discretionary Review with the Supreme Court of North Carolina. As a part of that Petition, the Petitioner raised the issue contained in Assignments Numbers One and Two of the Record on Appeal in the North Carolina Court of Appeals: whether the cocaine trafficking statute applied to "a derivative of coca leaves" despite the fact that the statute did not, in its terms, contain any references to that substance.

By an Order filed on September 22, 1982, the Supreme Court of North Carolina denied the Petition without opinion.

ARGUMENT

The decision of the North Carolina Court of Appeals is appropriate for review by this Court because it is in conflict with decisions of this Court.

The Petitioner was convicted of the sale and delivery of 454 grams of "a derivative of coca leaves" in violation of N.C.G.S. §90-95(h)(3). Petitioner was punished by imprisonment and fine pursuant to that provision.

That provision of the law, however, does not apply to a substance that is "a derivative of coca leaves." It applies only to "coca leaves" or their chemical equivalent. N.C.G.S. §90-95(h)(3).

The absence of coca leaf derivatives from the operation of the trafficking provisions can best be seen in the context of the other provisions of the Controlled Substance Act, contained in Article 5 of

Chapter 90 of the North Carolina General Statutes. The general (non-trafficking) provisions of the Act divide substances into six Schedules, proscribe acts in relation to the acts and the Schedules. The substances are defined within the Schedules. Schedule II includes the following:

> Coca leaves and any salts, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances
> . . . .

N.C.G.S. §90-90(a)4. Analysis of this definition reveals that it includes three types of substances:

Type 1. Coca leaves; and

Type 2. Salts, compound, derivative, or preparation of coca leaves; and

Type 3. Salt, compound, derivative, or preparation that is chemically equivalent or identical.

Effective July 1, 1980, the North Carolina General Assembly added a new trafficking subsection to Section 95 of the Controlled Substance Act. N.C.G.S. §90-95(h). This new subsection (h) provides increased punishment for trafficking in four general types of substances. Unlike the general (non-trafficking) provisions of the Act, however, the trafficking subsection does not prohibit acts and prescribe penalties with respect to specific substances that are named and defined in the trafficking subsection itself. The trafficking subsection contains the following sub-section:

> Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of coca leaves or any salts, compound, derivative, or preparation thereof which is chemically equivalent or identical. . . .

N.C.G.S. §90-95(h)(3). It is

immediately apparent that this definition is not the same as that set forth in Schedule II as part of the general (non-trafficking) provisions of the Controlled Substances Act. The trafficking definition includes only two of the three types of substance that are included in the definition found in Schedule II. It does not include the second type of substance that is a part of the Schedule II definition. Analyzed, then, the trafficking definition includes these substances:

Type 1. Coca leaves; and

Type 2.

Type 3. Any salts, compound, derivative, or preparation thereof which is chemically equivalent or identical.

The Petitioner, then, has been convicted and sentenced for trafficking in "a derivative of coca leaves" in violation of N.C.G.S. 90-95(h)(3). By its terms, however, that subsection does <u>not</u>

prohibit trafficking in "a derivative of coca leaves."

The North Carolina Court of Appeals agreed that the trafficking subsection does not include coca leaf derivatives among its substances. The Court concluded, however, that the omission was a legislative oversight. Thus, it held, "the full definition of cocaine in G.S. 90-90(a)(4) may be read into the trafficking in cocaine provisions of G.S. 90-95(h)(3)."

This conclusion by the North Carolina Court of Appeals is in conflict with decisions of the United States Supreme Court which held that Due Process requires that a criminal statute give adequate notice that the conduct charged is prohibited. See, e.g., Hynes v. Oradell, 425 U.S. 610 (1976); Smith v. Goguen, 415 U.S. 566 (1974);

Papachristou v. Jacksonville, 405 U.S. 156 (1972); Coates v. Cincinnati, 402 U.S. 611 (1971); Palmer v. Euclid, 402 U.S. 544 (1971); Wright v. Georgia, 373 U.S. 284 (1963).

In Palmer v. Euclid, supra, a city ordinance made it a crime for a person to wander about, with no visible or lawful business, and with no satisfactory account of himself. The defendant was convicted after he was observed, late at night, letting a female out of his car, parking with his lights on, talking on a two-way radio, and giving contradictory explanations of his conduct. The Supreme Court reversed, finding that the ordinance gave insufficient notice to the average person that conduct such as the defendant's was within the purview of the statute. Similar ordinances were held to be constitutionally infirm in Papachristou v. Jacksonville, supra, and Coates v.

Cincinnati, supra.

In Wright v. Georgia, supra, six young black men were convicted of violating a state statute that prohibited congregating for the purpose of disturbing the peace and failing to disperse upon being ordered to do so. The evidence was that the defendants were peacefully playing basketball in the park. The Supreme Court reversed, finding that the defendants could not have had notice that their conduct was prohibited by the statute in question. The Court held:

> It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process.

Id. at 293.

In the present case, the average person, including the Petitioner, had adequate notice that the sale and delivery of 454 grams of "a derivative of coca leaves"

was a violation of N.C.G.S. §90-95(a)(1). That section prohibits the sale and delivery of a controlled substance. A derivative of coca leaves is declared a controlled substance by N.C.G.S. §90-90 (a)4. A violation of that section is a felony punishable by a maximum term of imprisonment of ten years and a maximum fine of $10,000.00. N.C.G.S. §90-95(b)(1). However, no person could have adequate notice that the sale and delivery of 454 grams of "a derivative of coca leaves" would be a violation of the trafficking provisions of the Act and, therefore, subject to imprisonment for 16 to 40 years in prison and a minimum fine of $250,000.00. N.C.G.S. 90-95(h)(3). That section simply does not include "a derivative of coca leaves" as a prohibited substance.

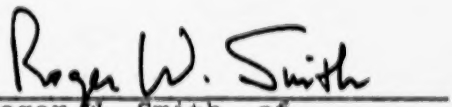
The present case, then, presents the unique situation where state courts have

simply inserted words in a statute to cover for what is referred to as "legislative oversight." Surely legislative oversight cannot be a constitutionally proper basis for a court to make criminal that which the legislature failed to make criminal.

Consideration and determination of this issue by this Court is important to reaffirm the principle that a citizen is entitled to notice that conduct is prohibited before he engages in that conduct.

CONCLUSION

For the reasons stated, and upon the authorities cited, the Petitioner respectfully contends that a Writ of Certiorari should issue to review the judgment and opinion of the North Carolina Court of Appeals.



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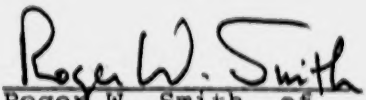
CERTIFICATE OF FILING

I certify that I filed the foregoing Petition for a Writ of Certiorari in the United States Supreme Court by depositing a copy thereof in an official depository of the United States Postal Service in a package on which first class postage had been prepaid, addressed to The Clerk, United States Supreme Court, Washington, D.C. 20543.

This the 22nd day of November, 1982.

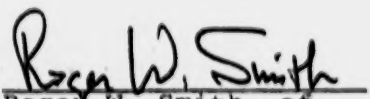


Roger W. Smith, of
THARRINGTON, SMITH &
HARGROVE
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that I served the foregoing Petition for a Writ of Certiorari on the State of North Carolina by depositing a copy thereof in an official depository of the United States Postal Service in a first class postage prepaid envelope addressed to Douglas A. Johnson, Assistant Attorney General, North Carolina Department of Justice, Justice Building, Raleigh, North Carolina.

This the 22nd day of November, 1982.



Roger W. Smith, of
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HARGROVE
Counsel for Petitioner

APPENDIX A

NO. 817SC 1264

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 1982

STATE OF NORTH CAROLINA

v. Wilson County
No. 80CRS7659

TRAVIS HICKS PROCTOR

Appeal by defendant from Llewellyn, Judge. Judgment entered 19 June 1981 in Superior Court, Wilson County. Heard in the Court of Appeals 5 May 1982.

Defendant was indicted for trafficking in cocaine. He pleaded not guilty and was tried before a jury.

The evidence for the State tended to show that S.B.I. Agent Irvin Lee Allcox met the defendant through Huley Hinnant, Jr., and Albert Junior Jones while Allcox was working in an undercover capacity. Allcox discussed purchasing large amounts of cocaine from the defendant, and a sale was arranged for 12 August 1980. On the

morning of that date, Allcox and another S.B.I. agent met the defendant at a motel outside Wilson and followed defendant to his mother's house. There the defendant made a telephone call and stated that his source would deliver the cocaine at noon; that he would take part of the money to his source, who would wait outside in his car, and bring the cocaine inside to be weighed and tested; and that he would then take the rest of the money to the source. A man in a Mercedes automobile arrived about noon, and defendant took part of the money to him. When defendant returned with the cocaine, he was arrested. The Mercedes sped away, but it was stopped and its driver, Gordon Dildy, was arrested. S.B.I. chemist Neil Evans identified the material submitted to him for analysis as 458.2 grams of white powder containing cocaine and dextrose.

The defendant testified and presented Hinnant and Jones as witnesses. Defense

evidence tended to show that defendant knew Allcox was an undercover agent, that defendant was helping him set up Gordon Dildy for arrest and had been promised protection, and that defendant was arrested only when the plan went awry and Dildy fled from the scene.

Defendant was found guilty as charged, and a sentence of imprisonment and fine were imposed. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

Abrams & Clark, by John E. Clark, for defendant appellant.

MORRIS, Chief Judge. The indictment charged defendant with trafficking in cocaine in violation of G.S. 90-95(h)(3). The defendant moved for a bill of particulars asking the State to identify more specifically the controlled substance involved. The State filed a bill of

particulars stating that the substance was "cocaine which is a derivative of coca leaves." Thereafter, the defendant moved to dismiss on grounds that "a derivative of coca leaves" is not included within the language of G.S. 90-95(h)(3) and, alternatively, on grounds that the statute is unconstitutionally vague as to whether "a derivative of coca leaves" is included within its terms. This motion was denied. At various times during trial, the defendant again moved to dismiss on these same grounds. These motions were denied, and all of these rulings are included in the defendant's first assignment of error. The defendant argues that "a derivative of coca leaves" is not included in G.S. 90-95(h)(3) as a substance that will support the crime of trafficking in cocaine and, alternatively, that the statute is unconstitutionally vague.

G.S. 90-89 through 90-94 list various controlled substances. Cocaine is a Schedule

II controlled substance defined by the following language of G.S. 90-90(a)4:

> Coca leaves and any salts, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

G.S. 90-95 declares various crimes relating to controlled substances. G.S. 90-95(b) and (d), the subsections dealing with possession, manufacture, sale, delivery, and possession with intent to manufacture, sell or deliver, rely upon the schedules of controlled substances contained in G.S. 90-89 through 90-94. G.S. 90-95(h) deals with trafficking in controlled substances. It does not refer to the schedules set by the earlier statutes. G.S. 90-95(h)(3), the subdivision dealing with cocaine, reads as follows:

> Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of coca leaves or any salts, compound, derivative, or preparation thereof which is chemically equivalent or identical to any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine) or any mixture containing any such substance, shall be guilty of a felony which felony shall be known as "trafficking in cocaine" and if the quantity of such substances or mixture involved . . . .

It is at once apparent that G.S. 90-95(h)(3) omits certain language included in the G.S. 90-90(a)4 definition of cocaine. G.S. 90-90(a)4 includes three groups: (1) coca leaves; (2) any salts, compound, derivative or preparation of coca leaves; and (3) any salt, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or

ecgonine. G.S. 90-95(h)(3) includes the first and third groups but not the second. The omission of the second group creates uncertainty as to what is included in the third group. For example, the meaning of the term "these substances" in the third group is clear when the second group is included but unclear when the second group is omitted. It is apparent to us that the omission of the second group listed in G.S. 90-90(a)4 from the language of G.S. 90-95(h)(3) was not a deliberate choice by the legislature since it results in an incomplete and confusing definition for the crime of trafficking in cocaine. We must determine the legal effect of this omission.

A criminal statute must be strictly construed, but the statute must be construed with regard to the evil which it is intended to suppress. In re Banks, 295 N.C. 236, 244 S.E. 2d 386 (1978) and cases

cited therein. The intent of the legislature controls interpretation of the statute, and when the statute is unclear in its meaning, the courts will interpret it to give effect to the legislative intent. Id. The legislative intent will be ascertained by such indicia as

> "the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in pari materia, the preamble, the title, and other like means. . . ."

Id. at 239, 244 S.E. 2d at 389, quoting State v. Partlow, 91 N.C. 550 (1884). Further, it is well established that "where a literal interpretation of the language of a statute would contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded." Id. at 240, 244 S.E. 2d at 389. With the foregoing principles in

mind, we turn to interpretation of G.S. 90-95(h)(3).

Subsection (h) was added to G.S. 90-95 in response "to a growing concern regarding the gravity of illegal drug activity in North Carolina and the need for effective laws to deter the corrupting influence of drug dealers and traffickers." State v. Anderson, N.C. App. , , 292 S.E. 2d 163, 165 (1982). The purpose behind G.S. 90-95(h) is to deter trafficking in large amounts of certain controlled substances.

> Our legislature has determined that certain amounts of controlled substances and certain amounts of mixtures containing controlled substances indicate an intent to distribute on a large scale. Large scale distribution increases the number of people potentially harmed by use of drugs. The penalties for sales of such amounts, therefore, are harsher than those under G.S. 90-95(a)(1).

State v. Tyndall, 55 N.C. App. 57, 60-61,

284 S.E. 2d 575, 577 (1981). Subdivision (3) deals with the controlled substance cocaine. The felony created is referred to as "trafficking in cocaine." Thus the purpose of G.S. 90-95(h)(3) would not be served - indeed, it would be thwarted - by a more restrictive definition of cocaine than that in G.S. 90-90(a)4. Under ese circumstances, we believe that the purpose of the trafficking statute must be given effect even if the strict letter thereof must be disregarded in order to do so. The schedules of controlled substances set forth in G.S. 90-89 through 90-94 and all the subsections of G. S. 90-95 deal with the same subject matter, violations of the Controlled Substances Act. Statutes dealing with the same subject matter are to be construed in pari materia. Williams v. Williams, 299 N.C. 174, 261 S.E. 2d 849 (1980); State v. White, N.C. App. , S.E. 2d (COA #8115SC1326, filed 3 August 1982). Thus, we believe that the

full definition of cocaine in G.S. 90-90 (a)4 may be read into the trafficking in cocaine provisions of G.S. 90-95(h)(3).

G.S. 90-95(h)(3), so construed, is not unconstitutionally vague.

> The standard is whether the statutory language gives a person of ordinary intelligence fair notice of what is forbidden by the statute. (Citations omitted.) A statute which does not involve First Amendment freedoms must be examined in light of the facts of the particular case when challenged as unconstitutionally vague. (Citations omitted.) The statute is not to be weighed in the delicate scales required where First Amendment freedoms are at stake. (Citation omitted.)

State v. White, N.C. App. at , S.E. 2d at . We conclude that the defendant was provided with sufficient notice for him to determine that the conduct which the State's evidence tended to show was proscribed. Thus, we hold that the defendant's motions to dismiss were properly denied and that his first assignment of error is overruled.

By his second assignment of error, the defendant argues that the trial judge erred in admitting the cocaine into evidence since the S.B.I. chemist failed to identify the cocaine as a derivative of coca leaves. The State filed a bill of particulars identifying the controlled substance involved in the charge as "cocaine which is a derivative of coca leaves." A bill of particulars limits the evidence of the State to the items set forth in the bill. G.S. 15A-925(e); State v. Knight, 261 N.C. 17, 134 S.E. 2d 101 (1964). Although chemist Evans only identified the controlled substance as cocaine during direct examination, he stated during cross examination by defense counsel that he "identified the compound cocaine, which is extracted from, or in a broad sense a derivative of coca leaves." The defense cured any deficiency in the State's proof by eliciting the testimony on cross examination. The second assignment

of error is overruled.

Defendant's final assignment of error deals with a question asked during cross-examination of defense witness Huley Hinnant, Jr. After Hinnant had repeatedly asserted his right against self-incrimination, the district attorney asked, "Well, the truth of the matter is that you take the Fifth Amendment because you know that in some way your testimony will show to the ladies and gentlemen of the jury what they already know, that Travis Hicks Proctor is one of the biggest drug dealers in Wilson County . . . isn't that it, Mr. Hinnant?" Objection to the form of the question was overruled, and Hinnant answered, "I don't know that, I wouldn't know." Defendant now argues that this question so prejudiced his case that he could not thereafter receive a fair trial. We do not approve either the question or the trial judge's overruling objection to it. "[C]ounsel may not, by argument or cross-examination, place before

the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence." State v. Locklear, 294 N.C. 210, 217, 241 S.E. 2d 65, 69 (1978). However, in the present case defendant only objected "to the form of the question." He did not allege such prejudice as denied him a fair trial, and he did not move for a mistrial on the basis of the question. We do not believe that this question reached the level of gross impropriety or the level of inflammatory impact that would require us to award a new trial. See State v. Jordan, 49 N.C. App. 561, 272 S.E. 2d 405 (1980); State v. Bailey, 49 N.C. App. 377, 271 S. E. 2d 752 (1980), disc. review denied, 301 N. C. 723, 276 S.E. 2d 288 (1981). The assignment is overruled.

In defendant's trial we find

No error.

Judges CLARK and MARTIN (Harry C.) concurred prior to 2 August 1982.

APPENDIX B

No. 520P82 Seventh District

SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * * * * * *

STATE OF NORTH CAROLINA	)	
	)	ORDER DENYING
v	)	PETITION FOR
	)	DISCRETIONARY
TRAVIS HICKS PROCTOR	)	REVIEW (817SC1264)

* * * * * * * * * * * * * * * * * *

Upon consideration of the petition filed in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> "Denied by order of the Court in conference, and the temporary stay entered 8 September 1982 is dissolved this the 21st day of September 1982."
>
> s/Martin, J.
> For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this

22nd day of September, 1982.

s/Peggy N. Byrd,
Chief Deputy Clerk

J. Gregory Wallace
Clerk of the Supreme
Court